NO. 45133-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

MICHAEL JOSEPH SMITH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-00766-5

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A LAWFUL USE OF FORCE INSTRUCTION.

B. STATEMENT OF THE CASE

Deputy Ellithorpe of the Clark County Sheriff's Office was on duty as a canine unit on April 21, 2013. RP 52. He was in a marked police car and wearing a standard uniform. RP 54. He was patrolling Highway 99 in Vancouver, and saw the defendant at the intersection of Highway 99 and 107th Street, waiting for the light to turn in his favor at a crosswalk. RP 55. Ellithorpe's light was green, indicating that the defendant's traffic signal for crossing was red. RP 57. In Ellithorpe's experience, this road is very dangerous for jaywalkers. RP 58. In the 2000s, there was a point in which there were three fatalities within a one month period on that same stretch of roadway of people crossing against the light. RP 58. The defendant jogged across the roadway in front of Ellithorpe, while Ellithorpe's light was green, and headed to a convenience store called Lyle's Village Pantry. RP 60-61. Ellithorpe proceeded to Lyle's Village Pantry to contact the defendant about his jaywalking. RP 61. As Ellithorpe pulled into the parking lot the defendant was nearing the door. Ellithorpe hit his air horn to get the defendant's attention and signal him over to the

patrol car. RP 61. After blowing the horn, the defendant looked at Ellithorpe, and Ellithorpe motioned with his hands for the defendant to come to him and said "Come here." RP 61. The defendant disregarded Ellithorpe's command and went into the store. RP 61-62. Ellithorpe entered the store and asked the defendant to come outside and talk to him about his jaywalking. RP 62. He found the defendant by the chips and candy and said "Hey, let's go outside and talk." RP 63. The defendant said "I don't think so." RP 63. Ellithorpe approached the defendant and said "Come on," and motioned for the defendant to follow him outside. RP 63. As Ellithorpe got close to the defendant, within three or four feet, the defendant turned to face him and put his fists up. RP 64. The defendant's fists were balled up and his elbows were out. RP 64. Ellithorpe described what happened next:

> When he put his fists up, I'm too close to back away safely, because he could just come in on me. So I drove in, reached between his hands, grabbed his jacket and just ran him towards the back of the store trying to trip him down and get him off balance.

RP 65.

Ellithorpe further explained "[W]hat I did was the fists came up and I thought I was going to get hit right then and there. I'm going to go in and me going in on the inside of his fists is going to create a block for my head." RP 84.

Ellithorpe took the defendant down to where the defendant was in a seated position. RP 65. He reached out to grab the defendant's left hand to roll him over and handcuff him, at which point the defendant punched him in the mouth. RP 65-66. The punch split Ellithorpe's lip. RP 66. He could see blood flowing down his uniform. RP 67. Deputy Ellithorpe required stitches to repair his lip. RP 69. They remained in his lip for a week to ten days. RP 69. At the time of trial, Ellithorpe still had a scar on his lip from the assault. RP 70.

The defendant testified on his own behalf. He claimed that he did not know that Ellithorpe was signaling to him outside of the store. RP 138. He claimed that the reason he did not leave the store with Deputy Ellithorpe at Ellithorpe's clear request was because he does not trust cops, and did not want to be away from the security camera and the witness in the store. RP 139. He testified, that when Deputy Ellithorpe moved toward him, he put his arms up to defend himself. RP 140. He testified that Deputy Ellithorpe looked into his eyes, and it made him feel threatened. RP 140. When Deputy Ellithorpe grabbed him, the defendant believed that Ellithorpe planned to drag him outside. RP 140. The defendant testified that he punched Ellithorpe because he felt threatened and because he felt that Ellithorpe was "violating" his "rights." RP 141. The defendant, however, admitted (perhaps inadvertently) that he was already in a

defensive stance when Deputy Ellithorpe moved toward him. RP 141. He testified his purpose in hitting the deputy was "to get him to let go of me." RP 143.

On cross examination, the defendant admitted his familiarity with mixed martial arts. RP 145. On his distrust of law enforcement officers, the defendant testified that he has heard "they can do bad stuff," like "planting drugs on somebody," and that he feared that Ellithorpe would "possibly" plant drugs on him. RP 145-46. The defendant claimed that when he was outside the store, he thought Ellithorpe was signaling to another guy that was getting out of his car. RP 146. He claimed that if he knew that Ellithorpe was signaling to him outside the store, he would have stopped and spoken with him. RP 146. The defendant could not explain, despite the prosecutor's repeated attempts to get him to explain, why he would have been willing, according to him, to stay outside and talk to the deputy had he known the deputy wanted to speak with him, but became unwilling to go outside with the deputy once he was inside the store. RP 155. He was asked "How is that any different than contacting him outside?" RP 155. The defendant replied "Because when I was inside, I did have the witness present and I wanted to preserve it." RP 155. The defendant admitted that Ellithorpe did not begin to approach him until after he disobeyed the command to go outside. RP 148.

Regarding his "fear," the defendant said he feared the deputy would "maybe" injure him. RP 148. Asked what kind of injury he feared, the defendant said "I figured he intended to injure me or drag me outside, away from my witness and the cameras." RP 149. Asked whether he feared all three of these things (injury, dragging outside, or planting drugs) or just one of them, he said "sure," and "I guess all three. I don't know what he intended to do to me outside." RP 149. He was forced to concede that he did not fear being shot, or stricken with a baton, and that the maximum he feared was being hit. RP 150-51. His fear was solely based on Ellithorpe advancing on him *after* his refusal to comply with the lawful command. RP 151. He conceded that his fear did not begin until Ellithorpe began moving toward him, contrary to his earlier testimony that his fear is ever present, and existed from the moment Ellithorpe asked him to go outside. RP 145-55.

The trial court declined the defendant's request to give WPIC instruction 17.02.01, which provides that it is a defense to the charge of assault if the force used was lawful. RP 191.[1] The force is lawful where the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. See Washington Pattern

[1] The defendant did not formally propose a written instruction pursuant to WPIC 17.02.01. He merely asked for it on the record. There is no clerk's paper, as a result, setting forth the defendant's proposed instruction.

Jury Instructions: Criminal, 17.02.01. The court found that the defendant had not presented sufficient evidence that would warrant giving an instruction that requires him (the defendant) to have been in fear of actual and imminent serious injury by an officer's use of excessive force. RP 191. The jury convicted the defendant of assault in the second degree. CP 96. This timely appeal followed. CP 128.

C. ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A LAWFUL USE OF FORCE INSTRUCTION.

In order to have the trial court instruct the jury on self-defense against a police officer acting within the scope of his duties, the defendant must show that he was in *actual* and imminent danger of *serious injury* and that the danger arose from the officer's use of *excessive force.* Here, the defendant did not even approach that standard, much less meet it.

As an initial matter, Smith does not explicitly state whether he is urging an abuse of discretion standard of review or a de novo standard of review. Stated another way, he has not said whether he believes that the determination of whether he was in actual and imminent danger of serious injury from the officer's use of excessive force is a factual question or a legal one. He simply asserts, repetitively, that the evidence must be taken

in the light most favorable to him in deciding whether to instruct the jury on self-defense. The Supreme Court stated, in *State v. Read*:

> To determine whether a defendant is entitled to an instruction on self-defense or entitled to have a judge consider it in a bench trial, the trial court must view the evidence from the standpoint of a reasonably prudent person who knows all the defendant knows and sees all the defendant sees.

State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002), citing *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (2002).

The Court went on to say:

> The standard of review when the trial court has refused to instruct the jury on self-defense depends on why the court refused the instruction. If the trial court refused to give a self-defense instruction because it found no evidence supporting the defendant's subjective belief of imminent danger of great bodily harm, an issue of fact, the standard of review is abuse of discretion. If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo. In this case, the trial court refused to consider Read's self-defense claim for both objective and subjective reasons. We will first address whether the trial court abused its discretion in finding Read did not produce sufficient evidence to support his claim he subjectively believed in good faith he was in imminent danger of great bodily harm.

Read at 243.

The State submits that the questions to be determined by the court in deciding whether to give the proposed instruction on self-defense were: (1) whether Smith was in actual danger of serious injury; (2) whether the

actual danger of serious injury was imminent; (3) whether the officer employed excessive; and (4) whether the actual and imminent danger of serious injury arose from the officer's use of that excessive force. These determinations were factual, and this Court should apply an abuse of discretion standard of review.

The trial court did not abuse its discretion. Whereas one is permitted to act on appearances in defending himself against another when the other person is not an arresting law enforcement officer, and proof of actual danger is not required, "[a] different rule applies, however, if one seeks to justify use of force in self-defense against an arresting law enforcement officer. Numerous cases have held a person may use force to resist arrest only if the arrestee *actually,* as opposed to *apparently,* faces imminent danger of serious injury or death." *State v. Bradley*, 141 Wn.2d 731, 737, 10 P.3d 358 (2000).

In *State v. Westlund*, 13 Wn.App. 460, 467, 536 P.2d 20 (1975), the Court of Appeals stated the policy rationale for this rule:

> [T]he arrestee's right to freedom from arrest without excessive force that falls short of causing serious injury or death can be protected and vindicated through legal processes, whereas loss of life or serious physical injury cannot be repaired in the courtroom. However, in the vast majority of cases, as illustrated by the one at bar, resistance and intervention make matters worse, not better. They create violence where none would have otherwise existed or encourage further violence, resulting in a situation of arrest

> by combat. Police today are sometimes required to use lethal weapons for self-protection. If there is resistance on behalf of the person lawfully arrested and others go to his aid, the situation can degenerate to the point that what should have been a simple lawful arrest leads to serious injury or death to the arrestee, the police, or innocent bystanders.

Division One of the Court of Appeals has also stated "[a] citizen's liberty interest does not justify physical resistance to uniformed officers. The place to settle such disputes is the courtroom, not on the street, and with law, not force, as the arbitrator." *State v. Ross*, 71 Wn.App. 837, 843, 863 P.2d 102 (1993). The Supreme Court adopted the *Westlund* analysis in *State v. Holeman*, 103 Wn.2d 426, 430, 693 P.2d 89 (1985). Later, in *State v. Valentine*, the Supreme Court extended to the *Holeman/Westlund* rule to arrests that may be unlawful. *State v. Valentine,* 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997).

Here, the defendant clearly did not fear actual and imminent serious injury from the officer's use of excessive force. As a starting point, Deputy Ellithorpe was not using excessive force which defeats this claim automatically. Deputy Ellithorpe would have been justified in physically removing the defendant from the store when the defendant refused Ellithorpe's lawful command to leave the store, but that is not why Ellithorpe advanced on the defendant. Ellithorpe advanced on the defendant because the defendant was about to hit him, having taken a

fighting stance and putting his clenched fists in the air. Ellithorpe did not have time to put enough distance between him and the defendant before the defendant could land a punch, so he was forced to charge him. Moreover, the defendant was in a sitting position (as opposed to lying prone on the floor) when he punched Ellithorpe, showing that Ellithorpe was hardly in a position of power over the defendant.[2]

Even if Ellithorpe had been using excessive force in subduing the defendant, the defendant did not fear serious injury. He feared, variously, the infringement of his rights, having drugs planted on him, and being dragged from the store. None of these constitutes actual and imminent fear of serious injury. The defendant's general distrust of law enforcement officers and his belief, based on what he has "heard," that officers plant drugs is exactly the type of fear that the Supreme Court has ruled insufficient to warrant physically resisting a police officer. Those grievances are to be addressed in the courtroom, not on the floor of Lyle's Village Pantry.

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[2] Our courts utilize an "objective reasonableness" standard to assess claims of excessive force in the context of arrests. See, e.g., *Staats v. Brown*, 139 Wn.2d 757, 774, 991 P.2d 615 (2000) (citing *Graham v. Connor*, 490 U.S. 386, 388, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)); *Estate of Lee ex rel. Lee v. City of Spokane*, 101 Wn.App. 158, 167, 2 P.3d 979 (2000). An officer making a lawful arrest may use any force "reasonably necessary to secure and detain the offender, overcome his resistance, prevent his escape, and secure him if he escapes." *Smith v. Drew*, 175 Wash. 11, 18, 26 P.2d 1040 (1933). In applying the "test of reasonableness," a court should consider (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he or she is actively resisting arrest or attempting to evade arrest by flight. *Staats*, supra at 774 (quoting *Graham*, supra, at 396).

The trial court did not err in declining to instruct the jury on the lawful use of force against a police officer. The defendant's conviction should be affirmed.

D. CONCLUSION

The judgment and sentence should be affirmed.

DATED this 11th day of April, 2014.

Respectfully submitted:

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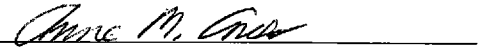
By: 
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